Supreme Court, U. S.
FILED
JAN 19 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1140

THE PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

vs.

EUGENE JONES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF MICHIGAN

WILLIAM L. CAHALAN
Prosecuting Attorney
Wayne County
State of Michigan

EDWARD REILLY WILSON
Chief Appellate Attorney

TIMOTHY A. BAUGHMAN (P-24380)
Assistant Prosecuting Attorney
12th Floor, 1441 St. Antoine
Detroit, Michigan 48226
Phone: (313) 224-5794

TABLE OF CONTENTS

		Page
Index of Authorities		ii
Opinions Below		2
Statement of Jurisdiction		2
Question Presented.		2
Constitutional Provisions Involved		2
Statement of Facts.		3
Reasons for Granting the Writ		5
Conclusion		10
Appendix "A"	Opinion of the Michigan Court of Appeals	11
Appendix "B"	Opinion of the Michigan Supreme Court	18

INDEX OF AUTHORITIES

Page

CASES

Blackledge v Perry
417 US 21; 94 S Ct 2094;
40 L Ed 2d 628 (1974) 4, 7-8

Chaffin v Stynchcombe
412 US 17; 93 S Ct 1977;
36 L Ed 2d 714 (1973) 4, 6-9

Colton v Kentucky
407 US 104; 92 S Ct 1953;
32 L Ed 2d 584 (1972) 3, 5, 8

Moon v Maryland
398 US 319; 90 S Ct 1730;
26 L Ed 2d 262 (1970) 7, 9

North Carolina v Pearce
395 US 711; 89 S Ct 2072;
23 L Ed 2d 656 (1969) 2, 4, 7

People v Jones
47 Mich App 160; 209 NW 2d 322 (1973) . 3

People v Jones
68 Mich App 660; 244 NW 2d 61 (1976) . 3

People v Jones
___Mich___; ___NW 2d ___(1978) . . 4

US CONSTITUTION

US Const, Am XIV 2

OTHER AUTHORITIES

28 USC, Sec. 1257(3) 2

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. .....

THE PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

vs.

EUGENE JONES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

Now Comes William L. Cahalan, Prosecuting Attorney in and for the County of Wayne, State of Michigan, by Edward Reilly Wilson, Chief Appellate Attorney, and Timothy A. Baughman, Assistant Prosecuting Attorney and prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Michigan, entered in the above-entitled cause on November 20, 1978.

OPINIONS BELOW

The Opinion of the Michigan Court of Appeals is reported at 68 Mich App 660; 244 NW2d 61 (1976), and is appended as Appendix "A". The opinion of the Michigan Supreme Court is reported at ____ Mich ____; ____ NW2d ____ (1978), and is appended as Appendix "B".

STATEMENT OF JURISDICTION

The judgment of the Michigan Court of Appeals was entered on May 17, 1976. The judgment of the Michigan Supreme Court, reversing the Michigan Court of Appeals, was entered on November 20, 1978. The jurisdiction of this Court is invoked under 28 USC, Sec. 1257(3).

QUESTION PRESENTED

Does North Carolina v Pearce, 395 US 711; 89 S Ct 2072; 23 L Ed 2d 656 (1969) prohibit a harsher sentence on resentence after deletion of material in the presentence report in the absence of actual vindictiveness or a reasonable likelihood of vindictiveness solely because of a possible "chill" on the exercise of the right to appeal?

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

STATEMENT OF FACTS

In 1971 defendant Eugene Jones was jury convicted of armed robbery and rape and sentenced to concurrent prison terms of 10 to 15 years. On appeal, the Michigan Court of Appeals remanded to the trial court to consider the possibility of the inclusion of improper material in the presentence report, and for resentencing if appropriate. People v Jones, 47 Mich App 160; 209 NW 2d 322 (1973). The original sentencing judge struck material from the report and disqualified himself. The next assigned judge granted a further motion to strike material from the presentence report and disqualified himself. The third judge, who had no knowledge of the prior sentence and only knew that there had been appellate proceedings because defense counsel so informed him, sentenced defendant to 20 to 40 years in prison.

On appeal from the harsher sentence, the Michigan Court of Appeals affirmed. People v Jones, 68 Mich App 660; 244 NW 2d 61 (1976). Relying on Colton v Kentucky, 407 US 104; 92 S Ct 1953; 32 L Ed 2d 584 (1972), the court found no possibility of vindictiveness observing:

> Finally, the statements of Judge Foley . . . reveal that he was not aware of the prior sentence nor any of the particular background of the case. In fact, his only knowledge of past events apparently arose when defense counsel willingly discussed some history with Judge Foley.

> The statements of Judge Foley as to his rationale for the imposition of the length of sentence are clearly set out in the concise statement of facts. They indicate no retaliatory or arbitrary motives. Rather, they reflect the careful reasoning of a seasoned Judge exercising his discretion as statutes and case law admonish him to do.

The Michigan Supreme Court granted leave and reversed, ordering the original 10-15 year sentence reinstated. People v Jones, ___Mich ___; ___NW 2d ___(1978). Relying heavily on Blackledge v Perry, 417 US 21; 94 S Ct 2098; 40 L Ed 2d 628 (1974) the Court, with two justices dissenting, found North Carolina v Pearce applicable to the above facts even in the absence of vindictiveness because "A defendant could realistically fear losing by winning and so be reluctant to press a meritorious appeal." The dissenting justices cited Chaffin v Stynchcombe, 412 US 17; 93 S Ct 1977; 36 L Ed 2d 714 (1973) for the proposition that Pearce "intimated no doubt about the constitutional validity of higher sentences in the absence of vindictiveness despite whatever incidental deterrent effect they might have on the right to appeal." 412 US at 29. Petitioner now seeks a writ of certiorari to review the judgment of the Michigan Supreme Court.

REASONS FOR GRANTING THE WRIT

The Michigan Court of Appeals held that North Carolina v Pearce, 395 US 711; 89 S Ct 2072; 23 L Ed 2d 656 (1969) did not apply to the facts of this case because resentencing was by a judge other than the one who first sentenced defendant who did not know the length of the first sentence. Thus, there was no indication of retaliatory motives. Though remarking that "we impute to the experienced and well-respected judge no 'vindictiveness' or intention to retaliate for a successful appeal," the Michigan Supreme Court reversed because "A defendant could realistically fear losing by winning and so be reluctant to press a meritorious appeal." In short, the court held that a "chill" on the exercise of the right to appeal violates due process regardless of whether that chill is caused by a reasonable likelihood of vindictiveness. Petitioner submits that the decision of the Michigan Supreme Court is contrary to decisions of this Court, but was caused by an ambiguity that appears when those decisions are read together. Plenary review by this Court is necessary to render clear the law in this area.

In North Carolina v Pearce, supra, this Court held that due process requires that "vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial;" further, in order to assure that a harsher sentence is not imposed through vindictiveness, whenever a harsher sentence is imposed the trial judge must state his reasons, which must concern "identifiable conduct on the part of the defendant occurring after the time of the original sentencing."

Since Pearce the Court has had occasion to review the Pearce doctrine in different contents. The Court held in Colten v Kentucky, 407 US 104; 92 S Ct 1953; 32 L Ed 2d 584 (1972) that a state procedure which allowed a defendant convicted in an inferior court to obtain a

trial de novo in a higher court, and permitted the possibility of a harsher sentence upon conviction from the trial de novo, did not run afoul of Pearce. Key to the holding was the observation that:

> . . . the Court which conducted Colten's trial and imposed the final sentence was not the court with whose work Colten was sufficiently dissatisfied to seek a different result on appeal; and it is not the court that is asked to do over what it thought it had already done correctly. Nor is the de novo court even asked to find error in another court's work. 407 US 116-117.

In short, the Court found the principle concern of Pearce - vindictiveness - to be sufficiently remote so as to avoid the Pearce result.

Absence of a reasonable possibility of vindictiveness was also crucial in Chaffin v Stynchcombe, 412 US 17; 93 S Ct 1977; 36 L Ed 2d 714 (1973), where the Court held Pearce inapplicable to jury imposed resentences. Stating that all doubt that Pearce was premised on the hazard of vindictiveness had been dispelled, the Court noted that the inquiry before it was thus as to possible vindictiveness. The Court found resolution of the case governed by the fact that the jury had not been informed of the prior sentence, holding that "the first prerequisite for a retaliatory penalty is knowledge of the prior sentence," 412 US at 26. Other distinguishing factors were cited by the Court:

> . . .the second sentence is not meted out by the same judicial authority whose handling of the prior trial was sufficiently unacceptable to have required a reversal of the conviction. Thus, the jury, unlike the judge who has been reversed, will have no personal stake in the prior conviction and no motivation to engage in self vindication. Similarly, the jury is unlikely to be sensitive to the institutional interests that might occasion higher sentences by a judge desirous of discouraging what he regards as meritless appeals (emphasis added). 412 US at 27.

The Court also specifically stated that Pearce "intimated no doubt about the constitutional validity of higher sentences in the absence of vindictiveness despite whatever incidental deterrent effect they might have on the right to appeal." 412 US at 29. Chaffin would appear to control the instant case.

The most recent case from the Court dealing with the issue is Blackledge v Perry, 417 US 521; 94 S Ct 2098; 40 L Ed 2d 628 (1974). In Colten the Court had held that a harsher sentence upon trial de novo was permissible; in Blackledge v Perry the Court held that Pearce prohibited the prosecutor from bringing more severe charges upon trial de novo than were brought originally. The Court found a great potential for vindictiveness in such a system. 417 US at 28-29. The language seized upon by the Michigan Supreme Court, which seems somewhat at odds with Chaffin is that "Pearce. . . was not grounded upon the proposition that actual retaliatory motivation must inevitably exist. . . . due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge."

A case frequently forgotten, though of crucial importance (and discussed in Chaffin), is Moon v Maryland, 398 US 319; 90 S Ct 1730; 26 L Ed 2d 262 (1970), wherein the Court, after granting certiorari to consider the question of the retroactivity of Pearce, dismissed the writ as improvidently granted. The rationale of the Court would compel reversal of the

Michigan Supreme Court:

> . . .the dispositive development is that counsel for petitioner has now made clear taht there is no claim in this case that the due process standard of Pearce was violated. As counsel forthrightly stated in the course of oral argument, "I have never contended that Judge Pugh was vindictive." 398 US at 320-321.

In the instant case respondent was sentenced by a judge who had no knowledge of his original sentence, after the original sentencing judge and another judge had deleted material from the presentence report and disqualified themselves. The judge who passed the sentence vacated by the Michgian Supreme Court would not even have known of the appellate proceedings which led to resentencing had appellate defense counsel not informed him. The sentencing judge placed his reasons for his sentence on the record: respondent's prior criminal history, the nature and seriousness of the offenses, and the use of a weapon during the offenses.

Several points are readily apparent. First, the case was not remanded for possible resentencing because of the error of any judge. The claim was that the presentence report contained reference to an uncounselled conviction. Judges do not prepare presentence reports; moreover, there was no objection to the report at the original sentencing. The "error", such as it was, was virtually unavoidable, and no fault can be laid at the door of the court. There was thus no motive for any judge of the court to vindicate himself or the court as an institution. Chaffin, Colten, supra. Second, the sentencing judge was a different judge than the original sentencing judge and had no knowledge of the original sentence. "The first prerequisite for a retaliatory penalty is knowledge of the prior sentence." Chaffin, supra.

Petitioner submits that the holding of the Michigan Supreme Court reduces to the proposition that the harsher resentence here violates due process solely because of the possibility of a chill on the exercise of the right to appeal. This holding is contrary to Chaffin, and results from a misconstruction of Blackledge, the misconstruction being that the Michigan Supreme Court failed to realize that the deterrence of the exercise of the right to appeal which the Court in Blackledge found offensive was inextricably bound to a reasonable possibility of vindictiveness . Due process does not require that all "chills" on appeal be eradicated, but only that a chill based on a reasonable possibility of vindictiveness be eradicated. The instant case presents no such possibility; indeed, both the Michigan Court of Appeals and the Michigan Supreme Court found no vindictiveness. Based on Chaffin and Moon v Maryland, the Michigan Supreme Court should be reversed.

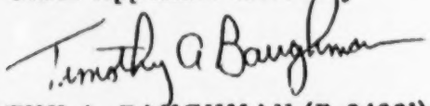
CONCLUSION

Wherefore, petitioner submits that the Michigan Supreme Court has misconstrued decisions of this Court, resulting in a substantial federal question such that plenary review should be granted.

Respectfully submitted,

WILLIAM L. CAHALAN
Prosecuting Attorney
Wayne County
State of Michigan

EDWARD REILLY WILSON
Chief Appellate Attorney



TIMOTHY A. BAUGHMAN (P-24381)
Assistant Prosecuting Attorney
12th Floor, 1441 St. Antoine
Detroit, Michigan 48226
Phone: (313) 224-5794

TAB:do
Dated: December 19, 1978.

APPENDIX "A"

OPINION OF THE MICHIGAN COURT OF APPEALS

(May 17, 1976)

BEFORE: BASHARA, P.J., and R.B. BURNS and QUINN, JJ.

BASHARA, J. The defendant was convicted on June 22, 1971 of armed robbery, MCLA 750.529; MSA 28.797, and rape, MCLA 750.520; MSA 28,788. He was sentenced to concurrent prison terms of 10 to 15 years by Judge Joseph A. Moynihan.

The convictions were subsequently affirmed by this Court, but the case was remanded for resentencing because the presentence report may have contained improper material. People v Jones, 47 Mich App 160; 209 NW2d 322 (1973).

The opinion of the Court of Appeals gave Judge Moynihan two options. He could hold an evidentiary hearing to determine if the presentence report contained a prior conviction that was constitutionally infirm which would require resentencing. In the alternative he could set aside the sentence and order resentencing.

Judge Moynihan chose the latter alternative. He granted the defendant's motion to strike the prior conviction and other arguably improper material from the presentence report. He then disqualified himself from the resentencing proceeding.

The case was reassigned to Judge George Bowles for resentencing. However, Judge Bowles granted another motion to strike additional material from the presentence report, and in turn disqualified himself from the case.

The matter was then reassigned to Judge Thomas Foley, who resentenced the defendant to terms of 20 to 40 years. The defendant appeals from the resentencing.

Defendant's sole contention is that Judge Foley's substantially higher sentence without supporting objective criteria violated the due process guarantees of US Const, Am XIV.

To adequately set the framework for discussing this issue, it is necessary to set forth the colloquy at the time of resentencing before Judge Foley, taken from the concise statement of facts filed in this Court:

"The Court: The Court has reviewed at length the Probation Report. The matter was not tried in my Court, and I think the record should so reflect.

Your attorney informs me this went to the Court of Appeals.

"The Defendant: Yes.

"The Court: This I wasn't aware of. I knew it has passed through the hands of a couple other judges who disqualified themselves. It went to the Court of Appeals and apparently there was something in the Probation Report originally that should not have been there and this was deleted and the first judge disqualified himself and it went to the second judge and apparently there was something in the Probation Report yet at that time that should not have been there and this was deleted and that judge disqualified himself and so it ended up in this Court.

"Now it is a very serious charge. As you know, you have been found guilty by a jury in front of Judge Moynihan of this Circuit.

You have been found guilty on two charges, Robbery Armed and Carnal Knowledge of Female Under Sixteen Years which according to the report took place during the robbery.

"Now we have an added factor in this case that you have an arrest and conviction February 4, 1961, Assault with Intent to Rape. You were convicted and sentenced to five to ten years in the State Prison, Southern Michigan. You were discharged from parole on that particular charge. These are serious and this is especially serious when I note that you had a gun and you used that as a weapon to force compliance with your desires in the course of the robbery.

"I have taken these into consideration. I have taken your age into consideration. Is that fourty-four now?

"The Defendant: Forty-six.

"It is the Sentence of the Court you be committed to the Michigan Corrections Commission, placed in the Commission's custody at State Prison, Southern Michigan, to serve a minimum term of not less than twenty years, a maximum term of not more than forty years with no recommendation. You will receive credit for 1,003 days."

Appellant's counsel objected to the increased sentence citing North Carolina v Pearce, 395 US 711; 89 S Ct 2072; 23 L Ed 2d 656 (1969) and arguing that any increase in sentence over that originally imposed before appeal had to be specifically supported on the record by reasons justifying the increase.

Judge Foley recapitulated his basis for imposing sentence as follows:

"The Court: Well, as I have indicated, this came in because of disqualification. I had no knowledge of the prior sentence other than the fact it was a sentence and the method by which it came here for sentencing. You actually filled me in prior to sentencing today counsel.

"I am not bound by the sentence of another judge. I have reviewed this transcript or rather the Probation Report, the life-style of this individual, prior crime, seriousness of the crime that he is before this Court on. I have stated the reasons for my sentence. You've got Count I, Robbery Armed. Count II, Carnal Knowledge of Female Over the Years of Sixteen. The man had a revolver and he used it to force his intentions. He had a prior record of similar type of crime, Assault with Intent to Rape. He has done time on that.

"Now in my view of this Probation Report which you have had access to and you apparently did not dispute anything in the Probation Report, the seriousness of the offense, the prior offense, it is my best judgment that the sentence of not less than twenty and not more than forty years is applicable to this case and that is what I have sentenced."

Defendant argues that North Carolina v Pearce, supra, is dispositive of the issue. In that case a defendant's conviction was overturned and a new trial ordered. After retrial and subsequent conviction the defendant was sentenced to what amounted to a longer period of incarceration than the original sentence.

The Supreme Court was there much concerned with the chilling effect that the possibility of subsequently greater sentences might impose on the right to appeal. The majority, speaking through Justice Stewart, indicated that:

"[W]henever a judge imposes a more severe sentence after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon * * * identifiable conduct on the part of the defendant after the time of the original sentencing proceeding." 395 US at 726.

At first blush it might appear that Pearce mandates no greater sentence on remand unless the resentencing judge can identify conduct after the original sentencing which justifies the greater punishment.

However, the Pearce doctrine was tempered in the subsequent case of Colten v Kentucky, 407 US 104; 92 S Ct1953; 32 L Ed 2d 584 (1972). There the defendant was fined $10 for disorderly conduct in a quarterly or justice court in Fayette County, Kentucky. He appealed to the circuit court of the county where, after a trial de novo, he was fined $50. The Supreme Court recognized the difference between the facts in Pearce and Colten where Kentucky has a two tiered system of trial de novo.

Justice White, writing for the 7 to 2 majority put Pearce in what we consider to be its proper perspective.

"But Pearce did not turn simply on the fact of conviction, appeal, reversal, reconviction, and a greater sentence. The court was there concerned with two defendants who, after their convictions had been set aside on appeal, were reconvicted for the same offenses and sentenced to longer prison terms. In one case the term was increased from 10 to 25 years. Positing that a more severe penalty after reconviction would violate due process of law if imposed as purposeful punishment for having successfully appealed, the court concluded that such untoward sentences occurred with sufficient frequency to

warrant the imposition of a prophylactic rule to insure 'that vindictiveness against a defendant for having successfully attacked his first conviction * * * [would] play no part in the sentence he received after a new trial * * * ' and to ensure that the apprehension of vindictiveness does not 'deter a defendant's exercise of the right to appeal of collaterally attack his first conviction * * * .' 395 US, at 725." Colten v Kentucky, supra, 116.

Reviewing the facts as they exist here we are not convinced that the mandate of North Carolina v Pearce, supra, has been circumvented. It is immediately apparent that the resentencing here was not as a result of a new trial. In fact, the conviction was affirmed. This Court gave Judge Moynihan the option of reviewing the propriety of guilty plea convictions appearing in the record or setting aside and resentencing. He chose the latter course of his own volition.

More importantly, when Judge Moynihan disqualified himself and referred the matter to another judge, he removed the source of the problem upon which reversal in North Carolina v Pearce, supra, was grounded. There no longer existed the fear of a retaliatory motive on the part of the sentencing judge.

We must also note that the state of the presentence report was in a position more favorable to the defendant when it finally came to the attention of Judge Foley. Both Judges Moynihan and Bowles deleted information upon the request of defense counsel.

Finally, the statements of Judge Foley, quoted in the certified concise statement of facts, reveal that he was not aware of the prior sentence nor any of the particular background of the case. In fact, his only knowledge of past events apparently arose when defense counsel willingly discussed some history with Judge Foley.

The statements of Judge Foley as to his rationale for the imposition of the length of sentence are clearly set out in the concise statement of facts. They indicate no retaliatory or arbitrary motives. Rather, they reflect the careful reasoning of a seasoned judge exercising his discretion as statutes and the case law admonish him to do.

Affirmed.

APPENDIX "B"

OPINION OF THE MICHIGAN SUPREME COURT

(November 20, 1978)

Eugene Jones was convicted by a jury in Wayne Circuit Court, Joseph A. Moynihan, J., of armed robbery and rape. The trial court sentenced the defendant to serve concurrent terms of 10 to 15 years. The Court of Appeals, Lesinski, C.J., and Fitzgerald and Van Valkenburg, JJ., remanded to the trial court for an evidentiary hearing to determine whether the presentence report had included improper material (Docket No. 12772). The trial judge concluded that it had, granted the motion to strike material from the report, and disqualified himself. The case was reassigned to another circuit judge who granted a motion to strike additional material and disqualified himself. The case was reassigned to a third judge, Thomas J. Foley, J., who did not know the length of the original sentences although he was aware of the procedural history of the case, and he resentenced the defendant on the basis of the revised presentence report to 20 to 40 years in prison. The Court of Appeals, Bashara, P.J., and R.B. Burns and Quinn, JJ., affirmed (Docket No. 20675). Defendant appeals. Held:

1. Due process of law requires not only that actual vindictiveness against a defendant for having successfully attacked his first sentence must play no part in the new sentence, but also that defendants who wish to exercise the right to appeal must be freed of the apprehension of retaliatory motivation. Therefore, whenever a judge imposes a more severe sentence upon a defendant after appellate review the reasons

objective information concerning identifiable conduct by the defendant after the original sentencing.

2. The fact that the judge who resentenced the defendant in this case was not the same judge who had originally sentenced him and did not know the length of the original sentence is not sufficient to warrant an exception to this rule. The resentencing judge was a member of the same court that the defendant successfully claimed had improperly sentenced him originally. The court was being asked to do over again that which was initially thought to be correct. This was not a fresh start by a completely different court as in a trial de novo in a superior court. If a greater sentence were allowed in cases like this, where the resentencing judge did not point to any conduct of the defendant since the original sentencing as having influenced the sentence finally imposed, only the most adventurous defendants could be expected to challenge a sentence based on defective information.

3. The revised presentence report used to resentence the defendant in this case was more favorable to him than the original report. It has not been shown that the resentencing judge relied on any conduct of the defendant after the original sentence in imposing the final sentence. The remarks of the resentencing judge show that he certainly would not have imposed a sentence lower than the one originally given if he had followed the rule. This rule does not preclude imposition of the same sentence after the deletion of improper material from the presentence report.

Reversed and remanded to the trial court for reinstatement of the 10- to 15-year concurrent sentences.

Justice Ryan, joined by Justice Williams, dissented on the ground that resentencing of a defendant by a judge who is not informed of an earlier sentence imposed by another judge is not a situation in which the "possibility of vindictiveness" inheres. There is no doubt about the constitutional validity of higher sentences in the absence of vindictiveness despite whatever incidental deterrent effect they might have on the right to appeal. The second sentence in the instant case was not meted out by the same judge and thus there was no motive for self-vindication. At most, the second sentencing judge might have some tendency to be sensitive to certain institutional interests that could result in a propensity to sentence more harshly in order to discourage appeals without merit or resentencing procedures. The possibility of such institutional sensitivity alone does not create an inherent likelihood of vindictiveness in the instant case. The sentence imposed is certainly within a reasonable exercise of discretion in light of the crime and the defendant's record and would unquestionably stand had the objection to the presentence report been timely raised before any sentence was imposed.

68 Mich App 660; 244 NW2d 6 (1976) reversed.

State of Michigan

Supreme Court

(November 20, 1978)

People of the State of Michigan,

Plaintiff-Appellee,

v No. 58661

Eugene Jones,

Defendant-Appellant.

BEFORE THE ENTIRE BENCH

M. S. COLEMAN, J.

The defendant was convicted by a jury in 1971 of armed robbery and rape and was sentenced by the trial judge to serve concurrent terms of 10 to 15 years in prison. The defendant then appealed and the Court of Appeals remanded to the trial court because of a possible constitutional error in the imposition of sentence. People v Jones, 47 Mich App 160; 209 NW2d 322 (1973). The original sentencing judge granted a defense motion to strike improper material from the presentence report, disqualified himself from resentencing and the case was assigned to another judge of the same court. The judge to whom the case was assigned granted another defense motion to strike improper material, also disqualified himself and the case was assigned to a third judge of the same court. The third judge assigned to the case knew its procedural history but did not know the length of the original sentence. He sentenced the defendant on the basis of the expurgated presentence report to a substantially

longer term in prison, 20 to 40 years. Defense counsel then brought to the judge's attention the trial judge's shorter sentence and argued that the sentence could not be increased unless some subsequent conduct warranted such action. The resentencing judge was not persuaded nor did he point to any such subsequent conduct. The defendant appealed and the Court of Appeals affirmed. 68 Mich App 660; 244 NW2d 61 (1976).

Three questions have been presented to this Court. Finding one issue dispositive of the case, we will confine our opinion to the following question:

> Do the prohibitions of North Carolina v Pearce, 395 US 711; 89 S Ct 2072; 23 L Ed 2d 656(1969), apply to the facts of this case?

We hold in the affirmative.

I

First, it is undisputed that the judge who imposed the 20 to 40 years sentence did not know the length of the original trial judge's sentence, although he did know that he was resentencing after remand by the Court of Appeals, several successful defense motions to strike and several disqualifications of his brethren on the bench. We impute to the experienced and well-respected judge no "vindictiveness" or intention to retaliate for a successful appeal. We make no judgment as to which was the more appropriate sentence.

The Court of Appeals found that because resentencing was by a judge other than the one who first sentenced defendant, although from the same bench, and because he did not know the length of the first sentence and there was no indication of retaliatory motives, the Pearce limitations did not apply.

In North Carolina v Pearce, the United States Supreme Court was faced with the question of whether the Federal constitution imposed any limitations upon the general power of a judge to impose, upon reconviction, a longer prison sentence than the defendant received after his first trial for the same crime. The Court answered this question, in part, as follows:

> "Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial, and since the fear of vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or to collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge."

The Court then formulated the following rule:

> "[W]henever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding."

The prosecutor argues that Moon v Maryland, 398 US 319; 90 S Ct 1730; 26 L Ed 2d 262 (1970), narrows the application of Pearce. We do not agree. In that case, the Court dismissed a writ of certiorari that had previously been granted to consider the question of whether North Carolina v Pearce, supra, would be applied retroactively. In a brief per curiam opinion, the Court gave two reasons for dismissal. The first was:

> "The facts that have emerged since the grant of certiorari impel us to dismiss the writ as improvidently granted. As an appendix to its brief, the respondent has filed an affidavit of the judge who presided at the second trial setting out in detail the reasons he imposed the [longer] sentence. Those reasons clearly include 'objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding'."

The per curiam then noted a "dispositive development" - petitioner was not claiming violation of the due process standard of Pearce. The Court does not decide what is not before it.

The Court of Appeals, however, did not rely in any part on Moon. Instead, it relied most heavily upon Colten v Kentucky, 407 US 104; 92 S Ct 1953; 32 L Ed wd 584 (1972), in which the Court was faced with the question of whether Pearce's prophlactic rule was applicable to Kentucky's two tiered system for adjudicating certain crimes. Under that system, a defendant charged with a misdemeanor could first elect to be tried in an inferior court and, if dissatisfied with the outcome, then could elect to have a trial de novo in a court of general jurisdiction. Defendant Colten had elected to have a trial de novo and, after being convicted again, received a more severe penalty than he had received after his conviction in the inferior court. The Court first explained the holding of Pearce:

> "Positing that a more severe penalty after reconviction would violate due process of law if imposed as purposeful punishment for having successfully appealed, the Court concluded that such untoward sentences occurred with sufficient frequency to warrant the imposition of a prophylactic rule to ensure 'that vindictiveness

> against a defendant for having successfully attacked his first conviction * * * [would] play no part in the sentence he received after a new trial * * *' and to ensure that the apprehension of such vindictiveness does not 'deter a defendant's exercise of the right to appeal or collaterally attack his first conviction * * *'."

The Court then went on to hold that Pearce's rule was not applicable to Colten's situation, stating:

> "Our view of the Kentucky two-tier system * * * does not lead us to believe * * * that the hazard of being penalized for seeking a new trial, which underlay the holding of Pearce, also inheres in the de novo trial arrangement. Nor are we convinced that defendants convicted in Kentucky's inferior courts would be deterred from seeking a second trial out of fear of judicial vindictiveness."

The Court considered several factors in distinguishing Colten from Pearce:

> "We note first the obvious: that the court which conducted Colten's trial and imposed the final sentence was not the court with whose work Colten was sufficiently dissatisfied to seek a different result on appeal; and it is not the court that is asked to do over what it thought it had already done correctly. Nor is the de novo court even asked to find error in another court's work.
>
> * * *
>
> "The trial de novo represents a completely fresh determination of guilt or innocence."

The facts in the case at bar are essentially the opposite from the Colten facts. Here, the court which resentenced the defendant was the same court which

had originally sentenced him. It was also the court which the defendant claimed had sentenced him improperly the first time around. It was doing over again that which was initially thought to be correct. The situation did not amount to a "fresh" start by a completely different court as in Colten.

In People v Payne, 386 Mich 84; 191 NW2d 375 (1971), this Court applied Pearce retroactively to a case in which the defendant had pled guilty and was sentenced before one judge, appealed and won the right to a new trial and, after reconviction, was sentenced to a longer term in prison by a different judge of the same court who knew the length of the original sentence.

In Chaffin v Stynchcombe, 412 US 17; 93 S Ct 1977; 36 L Ed 2d 714 (1973), the Court was asked to extend the Pearce rule to jury sentencing. The defendant had been convicted and sentenced by one jury, had appealed and won a new trial and had been convicted and sentenced by another jury to a longer term in prison. The Court first explained the rationale behind Pearce:

> "Under our constitutional system it would be impermissible for the sentencing authority to mete out higher sentences on retrial as punishment for those who successfully exercised their right to appeal, or to attack collaterally their conviction. Those actually subjected to harsher resentencing as a consequence of such motivation would be most directly injured, but the wrong would extend as well to those who elect not to exercise their rights of appeal because of a legitimate fear of retaliation."

The Court then went on to hold that the Pearce rule should not be extended to jury sentencing because "[t]he potential for * * * abuse of the sentencing process by the jury is * * * de minimis" and because

"there is no * * * real threat of vindictiveness".

The Court relied on several factors in reaching this decision:

> "The first prerequisite for the imposition of a retaliatory penalty is knowledge of the prior sentence. It has been conceded in this case that the jury was not informed of the prior sentence. * * * Other distinguishing factors between jury and judicial sentencing further diminish the possibility of impropriety in jury sentencing. As was true in Colten, the second sentence is not meted out by the same judicial authority whose handling of the prior trial was sufficiently unacceptable to have required a reversal of the conviction. Thus, the jury, unlike the judge who has been reversed, will have no personal stake in the prior conviction and no motivation to engage in self-vindication. Similarly, the jury is unlikely to be sensitive to the institutional interests that might occasion higher sentences by a judge desirous of discouraging what he regards as meritless appeals"

If we were to isolate the statement that "[t]he first prerequisite of a retaliatory penalty is knowledge of the prior sentence" and then elevate that statement to an absolute rule of law, disposition of the case at bar would be simple. However, we believe this statement must be considered in the context of the case which gave it life.

Unlike Chaffin, the case at bar does not involve jury sentencing. It involves judicial sentencing. In this respect it is much more like Pearce. The difference is insignificant. In this case, the second sentence was imposed by the same court which imposed the first sentence and the institutional interests absent in the context of jury sentencing are potentially present here. In addition, it is doubtful that the statement quoted

above was intended to be an absolute rule for all cases or that the knowledge of the prior sentence was intended to be the only determinative factor. In Michigan v Payne, 412 US 47, 50; 93 S Ct 1966; 36 L Ed 2d 736 (1973), decided the same day as Chaffin, the Court enunciated the dual purpose of the Pearce rule as follows:

> "The two purposes for the resentencing restrictions imposed by Pearce were to ensure (i) 'that vindictiveness against a defendant for having successfully attacked his first conviction * * * [would] play no part in the sentence he receives after a new trial * * *' and (ii) that apprehension of such vindictiveness would not 'deter a defendant's exercise of the right to appeal of collaterally attack his first conviction * * *'." (Emphasis added.)

In a later case, Blackledge v Perry, 417 US 21; 94 S Ct 2098; 40 L Ed 2d 628 (1974), the Court again had the opportunity to expound on the meaning of Pearce. Defendant Perry had originally been charged with a misdemeanor. After being convicted in an inferior tribunal, he exercised a state right to a trial de novo similar to that in Colten v Kentucky, supra. His first conviction was vacated and the case was set for trial. However, before trial began, the prosecutor secured an indictment charging the defendant with a felony for the same conduct that had led to the original misdemeanor charge. The defendant was convicted of the felony and sentenced to a substantially longer term in prison. The Court first synthesized the previous decisions of Pearce, Colten and Chaffin as follows:

> "The lesson that emerges from Pearce, Colten, and Chaffin is that the Due Process Clause is not offended by all possibilities of increased punishment upon retrial after appeal, but only by those that pose a realistic likelihood of 'vindictiveness'." Blackledge supra, 27.

The Court then concluded that "the opportunities for vindictiveness in this situation are such as to impel the conclusion that due process of law requires a rule analogous to that of * * * Pearce".

The Court relied on two factors in reaching this conclusion. The first was that the prosecutor "has a considerable stake" in discouraging appeals "since such an appeal will clearly require increased expenditures of prosecutorial resources * * * and may even result in a formerly convicted defendant's going free". Second, "if the prosecutor has the means readily at hand to discourage such appeals -- by 'upping the ante' * * * -- the state can insure that only the most hardy defendants will brave the hazards of a de novo trial".

The Court in Blackledge made it clear that actual vindictiveness was not the key to whether a Pearce-type rule was required. Emphasizing the second purpose of the Pearce rule -- freeing defendants of the fear of retaliatory motivations -- the Court said:

> "There is, of course, no evidence that the prosecutor in this case acted in bad faith or maliciously in seeking a felony indictment against Perry. The rationale of our judgment in the Pearce case, however, was not grounded upon the proposition that actual retaliatory motivation must inevitably exist. Rather, we emphasized that 'since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge'." (Emphasis added.)[2]

It is thus not decisive in this case that the resentencing judge lacked actual "vindictiveness". The

presentence report used to resentence the defendant in the same court was more favorable to him than the original report. He had appealed and won, filed a motion to strike and won and filed another motion to strike and won again only to receive a substantially longer term in prison. Two previous judges had disqualified themselves. The resentencing judge did not point to any conduct of the defendant since the original sentencing as having influenced the sentence finally imposed.

No subsequent affidavit to that effect has been filed.

We hold that the rule of Pearce applies to these circumstances. If we were to hold otherwise, for reasons similar to those stated in Blackledge, only the most adventurous defendant could be expected to challenge a sentence based upon defective information. He might win the battle, as here, but lose the war and end up in a worse position than before his "victory" -- and through no fault of his own subsequent to the original sentencing. A defendant could realistically fear losing by winning and so be reluctant to press a meritorious appeal.

On the other hand, deletion of improper material from judicial consideration might make no difference in the overall determination and the sentence could well remain the same under Pearce.

II

Had the resentencing judge in the case at bar applied the rule of Pearce, it is not doubted that he would have sentenced defendant to the same terms as the trial judge. He certainly would not have lowered the sentence.[3]

Therefore, we reverse and remand to the trial

court for reinstatement of the 10 to 15 year concurrent sentences.

/s/ Mary S. Coleman
John W. Fitzgerald
Thomas Giles Cavanagh
Blair Moody, Jr.
Charles L. Levin

1

The following exchange occurred at the final sentencing hearing prior to imposition of sentence:

"THE COURT: The Court has reviewed at length the Probation Report. The matter was not tried in my Court, and I think the record should so reflect.

"Your attorney informs me this went to the Court of Appeals.

"THE DEFENDANT: Yes.

"THE COURT: This I wasn't aware of. I knew it had passed through the hands of a couple other judges who disqualified themselves. It went to the Court of Appeals and apparently there was something in the Probation Report originally that should not have been there and this was deleted and the first judge disqualified himself and it went to the second judge and apparently there was something in the Probation Report yet at that time that should not have been there and this was deleted and that judge disqualified himself and so it ended up in this Court."

2

See also United States v Mathis, 579 f2d 415 (CA 7, 1978), where the defendant, originally sentenced to concurrent prison terms for two separate crimes, was resentenced to one prison term and one term of probation to be served consecutively. The resentencing judge specifically stated that his intention was to

reduce the original sentence. The Court of Appeals, despite finding "no suggestion of vindictiveness", applied Pearce because the actual effect of the second sentence was to increase the potential time of incarceration and, as in the case at bar, the information available at resentencing was more not less favorable to the defendant.

3

"Now in my view of this Probation report which you have had access to and you apparently did not dispute anything in the Probation Report, the seriousness of the offense, the prior offense, it is my best judgment that the sentence of not less than twenty and not more than forty years is applicable to this case and that is what I have sentenced."

State of Michigan

Supreme Court

People of the State of Michigan,

Plaintiff-Appellee,

v #58661

Eugene Jones,

Defendant-Appellant.

RYAN, J. (Dissenting)

The majority of the Court has concluded that the rule of North Carolina v Pearce, 395 US 711; 89 S Ct 2072; 23 L Ed 2d 656 (1969), applies to nullify the greater sentence imposed on the defendant by a judge to whom his case was transferred for resentencing following a successful effort to have improper material excised from the presentence report.

I respectfully disagree. I am convinced that resentencing of a defendant by a judge who is not informed of an earlier sentence is not a situation in which "the possibility of vindictiveness" inheres.

Pearce requires that, where it applies, a judge imposing a more severe sentence upon a defendant must state facts not made known to the first sentencing judge.

In Chaffin v Stynchcombe, 412 US 17; 93 S Ct 1977; 36 L Ed 2d 714 (1973), however, the Court made it clear that "Pearce was premised on the hazard of vindictiveness", 412 US 25, and that unless the likelihood a defendant will be penalized for exercising rights to

post-conviction processes is perceived to exist, Pearce does not apply. The Court in Pearce "intimated no doubt about the constitutional validity of higher sentences in the absence of vindictiveness despite whatever incidental deterrent effect they might have on the right to appeal." Chaffin v Stynchcombe, 412 US 29.

The majority opinion in Chaffin identified potential sources of vindictiveness in retrial and resentencing situations and found no real threat of vindictiveness where the jury is not informed of the prior sentence and the second sentence is not otherwise shown to be a product of vindictiveness.

"The first prerequisite for the imposition of a retaliatory penalty is knowledge of the prior sentence." Chaffin, 412 US 26. The second sentencing judge in this case had no knowledge of the original sentence or of the prior history of the case. See the majority opinion (fn 1).

Nor was the second sentence meted out by the same judge and thus there was no motive for self vindication.

At most, the second sentencing judge might have some tendency to be sensitive to certain institutional interests that could result in a propensity to sentence more harshly in order to discourage meritless appeals or resentencing procedures. The possibility of such institutional sensitivity alone was not seen to create an inherent likelihood of vindictiveness in a two-tier system of trial courts in Colten v Kentucky, 407 US 104; 92 S Ct 1953; 32 L Ed 2d 584 (1972). I am not convinced that it does so here.

In sum, I do not believe that the circumstances presented in the case at bar present any likelihood of vindictiveness toward particualr defendants. A

defendant has no reason to fear that a judge who is unaware of a prior sentence will increase it out of vindictiveness. Moreover, there is no indication that the circuit judge was motivated by actual vindictiveness in imposing the second sentence. The sentence is certainly within a reasonable exercise of discretion in light of the crime and the defendant's record and would unquestionably stand had the questionable matter in the presentence report been timely raised before any sentence was imposed.

I would affirm the Court of Appeals.

/s/ James L. Ryan
G. Mennen Williams